In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 357

THE PACKER CORPORATION,
Appellant,

vs.

THE STATE OF UTAH.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

REPLY BRIEF OF APPELLANT.

GARDNER ABBOTT,
WILLIAM H. REEDER, JR.,
DAN B. SHIELDS,
W. T. KINDER,
Counsel for Appellant.

Of Counsel:
MARVIN BOWER.

Cleveland, Ohio,
January 14, 1932.

INDEX.

Discussion of State Board of Tax Commissioners v. Jackson 3

Conclusion 5

Authorities Cited.

New York Indians v. U. S., 170 U. S. 1, 32 (1897) 2

State v. The Packer Corporation, 297 Pac. 1013, (1931) 1

State Board of Tax Commissioners v. Jackson, 283 U. S. 527 (1931) 3, 4

Compiled Laws of Utah 1917, Section 8443 .....1, 2

Laws of Utah 1921, Chapter 145, Section 3 2

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 357

THE PACKER CORPORATION,

Appellant,

vs.

THE STATE OF UTAH.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

REPLY BRIEF OF APPELLANT.

The appellee at page 3 of its brief cites Section 8443 Compiled Laws of Utah 1917, by which a minor having, *inter alia,* cigars, cigarettes or tobacco in his possession is deemed guilty of a misdemeanor.

Section 8443 does not appear in the Record, nor was it argued on behalf of the State of Utah in the District Court of Salt Lake County at the trial of appellant, nor was it argued to the Supreme Court of Utah. The majority opinion of the Supreme Court of Utah made no mention of this statute, nor did that court comment upon or refer to that statute in the case of *State v. The Packer Corporation,* 297 Pac. 1013, (1931) which is relied upon by both appellant and appellee.

Indeed, the dissenting opinion by Mr. Justice Straup in said case, set forth in full in appellee's brief, pages 46-72, and concurred in by Mr. Justice Hanson, states specifically:

> "However, at and in all other places a minor was and is at liberty to chew and smoke tobacco in all its

> forms without restriction and under the same conditions that an adult is permitted to use tobacco." (see page 46 of appellee's brief.)

This positive statement of Mr. Justice Straup is adopted in full by the appellant at page 6 of its brief.

Appellant recognizes, however, that this Court may take judicial notice of Section 8443. *New York Indians v. U. S.*, 170 U. S. 1, 32 (1897).

It would seem that the statement of Mr. Justice Straup is not fully justified unless Section 8443 is presumed by the Supreme Court of Utah to have been repealed by implication by some later law covering the same subject, such as Section 3 of Chapter 145 of the Laws of Utah 1921, as amended (see page 25, appellant's brief). Whether there has been repeal by implication appellant does not assert. It is also possible that Section 8443, being included among the miscellaneous and little-used statutes of Utah, has never been enforced and hence has been overlooked.

In any event, whether or not minors are permitted the use of tobacco under certain restrictions and in certain places, there is no question but that the sale and use of tobacco in all forms is entirely legal in the State of Utah with respect to all classes except minors.

The argument of appellee is entirely to the effect that the classification of billboards, street car signs and placards is justified and reasonable because of the "alluring" quality of such advertisements to minors and because in the opinion of appellee the strength of character of a minor is not sufficient to withstand such allurement on a billboard, although the same advertisements, with all their color and allurement, appearing in a periodical are not alluring to the same extent and hence are not prohibited. Certainly magazines and periodicals, which as a matter of common knowledge are retained in the home, open to inspection by

all members of the family, including minors, would seem to present an equally constant attraction. Certainly there is no more necessity of a minor glancing at a billboard than at a magazine or newspaper. No facts of any kind appear in the record suggesting any real distinction between billboard and periodical advertising. If we are to speak of matters of common knowledge, it would seem more probable that the attention of minors is more strongly directed toward magazines, periodicals and newspapers than toward billboards.

The advertisment of tobacco appearing in a periodical is legal, while the same advertisement in the same colors appearing on a billboard is illegal. Keeping in mind the evil which the appellee says the Utah Legislature sought to remedy, there can be no reasonable classification between billboard and periodical advertising. The youth of Utah is just as apt to succumb to the "persuasion and inducement" of the tobacco advertisement appearing in the magazine lying upon the living-room table of the home as he is to be persuaded and induced even by the rows of billboards which the appellee mentions in its brief.

DISCUSSION OF STATE BOARD OF TAX COMMISSIONERS v. JACKSON.

The appellee on page 19 of its brief cites the case of *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527 (1931), as being in point to prove that the differences between magazine, newspaper and periodical advertising and placard, street car and billboard advertising are sufficiently great so that the Utah Legislature may distinguish between them and prohibit the former types while allowing the latter. The appellant submits that the *Jackson* case is not in point upon that proposition.

The *Jackson* case involved the constitutionality of a statute taxing chain stores at a different rate from inde-

pendently owned stores. At the outset it should be recognized that in the *Jackson* case this Court was not considering the statute there in question from the standpoint of a police measure, but as a tax measure. This Court, speaking through Mr. Justice Roberts, states:

> "In the court below appellants defended on the grounds that the statute was an exercise of the police power and was also a revenue measure which levied an ordinary occupation tax. They offered no evidence to sustain the first ground mentioned, and do not press it here. They now stand only upon the power of the legislature, in prescribing an occupation tax, to classify businesses, so long as its action is not unreasonable and arbitrary." (page 533)

The distinction between the *Jackson* case and this case lies in the differences in facts. This Court said:

> "The appellants produced evidence to prove that there are many points of difference between chain stores and independently owned units. These consist in quantity buying * * * buying for cash * * * warehousing of goods * * * a pricing and sales policy different from that of the individual store * * * a greater turn-over * * * standard forms of display * * * standardization of store management, sales policies and goods sold." (page 534)

In the instant case the record does not show a single fact to indicate any real distinction between magazine, newspaper and periodical advertising and placard, street car and billboard advertising.

The distinction, therefore, between the *Jackson* case and the instant case lies in the fact that in the *Jackson* case there was evidence in the trial court of real distinctions in fact between the classes defined by the legislature, whereas in the present case there were no facts presented in the trial court to show any distinction whatsoever between magazine, newspaper and periodical advertising and placard, street car and billboard advertising.

CONCLUSION.

There is no reasonable basis in the classification of advertising mediums attempted by the Legislature of Utah. One form is just as dangerous to the youth of Utah as the other, and to prohibit one form while at the same time allowing the use of another is to legislate in a manner contrary to the Constitution of the United States.

Respectfully submitted,

GARDNER ABBOTT,
WILLIAM H. REEDER, JR.,
DAN B. SHIELDS,
W. T. KINDER,
Counsel for Appellant.

Of Counsel:
MARVIN BOWER.

Cleveland, Ohio,
January 14, 1932.